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IN THE

Supreme Court of the United States

October Term, 1973

No. 73- 1306

ROBERT L. STARNES
Petitioner

V.

NORFOLK AND WESTERN RAILWAY COMPANY
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
NATURE OF THE CASE	2
FACTS	2
ARGUMENTS	11
1. May a plaintiff in a Federal Employers Liability Act case, who is previously cautioned not to do so, voluntarily inject evidence of the receipt of Railroad Retirement Board benefits and thereafter assert prejudicial error as a result of his disregard of the admonition?	11
2. Did the trial court misinstruct or erroneously explain its prior charge to the jury when it responded to a question from the jury?	14
CONCLUSION	18
CERTIFICATE	19

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, Norfolk and Western Railway Company, files this brief in opposition to the petition for writ of certiorari filed by the petitioner herein and asserts that none of the reasons set forth in Rule 19(b) apply to this case and that this Honorable Court should not grant a writ of certiorari.

QUESTIONS PRESENTED

1. May a plaintiff in a Federal Employers Liability Act case, who is previously cautioned not to do so, voluntarily inject evidence of the receipt of Railroad Retirement Board benefits

and thereafter assert prejudicial error as a result of his disregard of the admonition?

2. Did the trial court misinstruct or erroneously explain its prior charge to the jury when it responded to a question from the jury?

STATEMENT OF THE CASE

Nature of the Case

Plaintiff filed his complaint alleging the defendant was guilty of negligence in violating the Federal Employers Liability Act and was guilty of violating the Boiler Inspection Act (which does not require proof of negligence). During the discussion concerning the proposed charge, the plaintiff abandoned his claim of negligence under the Federal Employers Liability Act and proceeded on his claim of violation of the Boiler Inspection Act. (Trial Transcript, page 232) The jury returned a verdict for the defendant.

FACTS

The petitioner will be referred to in this section as the plaintiff, the position he occupied in the trial.

The plaintiff and his fireman testified that the interior of the locomotive cab was dirty with peanut shells, trash, dust and debris when they started their shift, but the conductor, Irving Trigleth, who was in charge of the crew and had been a conductor for sixteen of his twenty-one

years with the Railway Company, and who was called by plaintiff as a witness, testified that it is the practice and custom for the engineer (the plaintiff) to sweep the cab out before the tour began. (51. All references hereafter are to the appendix filed in the Court of Appeals.) Complying with the custom, the plaintiff said, ". . . I took the broom and swept it all out myself, but I swept it all out the rear door of the engine--the paper and everything--and tried to get most of the dirt that I could see in that area, and most of this dirt was right in the center of the cab and on the engineer's side, and I swept it out on the back running board and then I swept the running board off." (62)

The locomotive is equipped with boxes for the storage of sand used to aid traction. (66, 127-128) When the sand is deposited on the rail and run over by the wheels of the locomotive it becomes powdery (129) and the plaintiff stated that "this powdery ground up sand" was on the stainless steel threshold of the cab door causing him to slip. (83) The conductor testified that it is normal for a certain amount of dust and sand to accumulate on the floor of the cab. (50) The plaintiff fell three hours after the shift began. (20-21)

The plaintiff's testimony at the trial was that he slipped on the threshold and while slipping caught the heel of his shoe on the threshold. (71, 91) However, plaintiff introduced into evidence a personal injury report he filed. (74-75, Plaintiff's Exh. 7) In his own handwriting he reported:

> This C.T. 37 form is submitted because of apparent lack of information on the first form turned in by Mr. Kelly. This is to ensure that all pertinent facts and witnesses in this case are correct and identifiable. (91)

The form had a question: "What was said by injured person as to cause of accident and extent of injuries?" The plaintiff wrote:

> Hooked heel of shoe on protruding edge of threshold of step on engine 37 causing me to slip and strike the lower part of my back on the step. Step was on fireman's side of engine and had a small amount of sand on it. (92)

The form also provided a "Remarks" section: "Remarks: Give full particulars as to how accident occurred." Again, the plaintiff wrote:

> Engineer R. L. Starnes attempted to exit from door on fireman's side of engine and hooked heel of shoe on raised portion of threshold causing him to slip and fall, striking the lower portion of his back on the steel threshold, causing apparent injury. Small amount of sand was on threshold step. (92-93)

Guy Kelly, who had general supervision over plaintiff's work, took him to the hospital. He testified that plaintiff

explained to him "that his shoe had caught and he tripped and fell out the door." (113) Kelly said plaintiff made no mention of the condition of the cab. (113) Kelly inspected the walkways, the steps and the cab and took exception to nothing. (113)

Emory Mutter, a machinist called to inspect the locomotive, looked over the whole unit and found nothing wrong. (114-115)

Ralph White, roundhouse shift foreman, made a complete inspection including the condition of the sill at the fireman's door and found it to be in a normal condition. (117-118)

An issue not raised in the pleadings or in the final pre-trial order was injected by plaintiff's attorney in his opening statement. He stated to the jury:

> The fireman's door had not been opened that morning, and when Mr. Starnes went up and opened the door, there was a rise on the bottom of this door, which will be called the threshold, which will vary anywhere from three-eighths of an inch to a half an inch rise; and, actually, this was a rise from the floor and this rise--actually, there wasn't anything underneath this. This was a rise that occurred; that it should have been, it will be our contention, flush with the floor; that there wasn't anything between it, and there was a rise this high. It was a strip. You

> think of any door that has a strip under it or--this had actually come up and that Mr. Starnes had to actually step over this rise in order to get on the steps that go right down on the running board. (15)

Following this opening statement and before the opening statement of the Railway Company's counsel, there was a conference out of the presence of the jury concerning this new contention. At that time, plaintiff's counsel stated, "We are not asking the jury to say that that was not a proper appurtenance. All we are saying, he had to step up." When advised that he indicated to the jury his contention was that the sill should have been flush with the floor, he stated, "Well, if I said that, I didn't mean to go that far on the thing." (18) It was agreed that Railway's counsel would advise the jury in his opening statement that there was an agreement that no contention was made concerning the construction of the locomotive and that plaintiff's counsel's statement was inadvertent. (18-19)

The plaintiff's credibility was much in issue and will be referred to hereafter. In nearly every instance, the plaintiff, himself, would inject matter prompting an attack upon his credibility.

When asked if he had worked for the railway since the accident, the plaintiff stated that he worked about fourteen days in February, 1972 but was then fired "because I instituted suit against them." (79) Plaintiff returned to work on January 13, 1972 and was fired on

February 8, 1972 (94) following a formal investigation into his whole work record. On cross-examination, he denied having any knowledge that a hearing to consider his work record had been pending since shortly after the accident. (94, 130) Plaintiff was shown a copy of a letter dated April 28, 1971 (three days following the accident) advising him that a formal investigation into his work record, including his most recent accident and eleven other accidents, would be held on a given date and inviting him to have witnesses and a representative present. His signature acknowledging receipt of the notice was on the copy of the letter and he verified it at the trial. (136-137) He also acknowledged his signature on another letter advising him of the postponement of the hearing. (137-138)

Plaintiff was questioned at the trial concerning statements made at the Railway Company's formal investigation which appeared to be inconsistent with his trial testimony. He explained that he had been refused a copy of the transcript of the investigation and his representative had also been refused a copy. (104, 138) But he then modified his testimony and said he received one or two pages of the transcript and was asked to make corrections. (138) Then he modified his testimony again and said it was possible he had received the transcript of his testimony but "I wasn't sure that it was my entire testimony." He was shown and acknowledged a sheet of paper in his own handwriting where he requested a slight modification of the final copy of the transcript. (140)

At the trial, plaintiff testified he had not returned to see Dr. Goldner at Duke University because Dr. Goldner had told him that he would have "pain probably for many months or even possibly the rest of my life. He said it was up to me, the degree of pain I could stand." (97) His discovery deposition was brought to his attention where he stated: "The bill is quite expensive down there when you go down there, and I really would have liked to go see him again to tell him I still have pain, but I just can't afford to go down there." (98) He attributed the inconsistency in his testimony to nervousness and explained, "I don't know why I made the statement that I couldn't afford it, because I could have afforded to go down there." (98)

Plaintiff testified that from April 25, 1971 (the date of the accident) until January 13, 1972 (the date he returned to work) he had earned only $328.67 in other jobs. (80) He also testified that since February, 1972, when he was discharged by the railway company, he only had done some odd jobs and had sought employment by other railroads without success. (107) Again, he was referred to his discovery deposition wherein he swore that since being fired he had been employed no where, had done a "little housework, a lot of reading, riding around. . . But I am unable to take a job and do the work that it would require me to do in another occupation to make the same amount of money that I was making on the railroad." Also, he had said he had not applied for work anywhere. He explained these inconsistencies as caused by misunderstandings of the question. (108)

The plaintiff was asked on cross-examination if it was not true that since November, 1971 he had been making steady deposits into his checking account. He replied affirmatively. (141-142) There was a lengthy discussion out of the presence of the jury concerning the bank statements and the sources of the deposits made by the plaintiff from November, 1971 through September, 1972 (the time of the trial). (142-152) During this discussion, the plaintiff testified he received Railroad Retirement Board checks, that several large deposits came from bank loans and "four, five, six, seven times a month" he would take cash from a box he kept at home and make deposits. The amount he kept in the box at home varied. "Sometime get as low as a thousand dollars, and at times I have as much as four thousand; four thousand, five hundred, in there." (147) Defendant sought admission of the testimony as affecting the plaintiff's credibility and the trial judge commented: "Obviously, a man who tells a story like that, the jury is entitled to hear it." (148)

Plaintiff's attorney objected to the evidence on the ground that "part of that money on those statements obviously came from railroad retirement." (148) The trial court advised plaintiff's attorney that the bank statements, themselves, would not go into evidence and that "we are not going into a detailed accounting." Counsel for Railway twice cautioned the plaintiff. First, "I will ask you nothing about railroad retirement benefits." (T. 148) Secondly, "Let me just caution you, Mr. Starnes. When I ask you about these deposits, you need not mention anything came from railroad retirement." (150-151)

The trial court cautioned: "If Mr. Starnes himself wishes to inject into this case that he did receive railroad retirement benefits, then I say to him that the courts have consistently ruled that such evidence is not admissible. . . So it is just up to Mr. Starnes and Mr. McMurran as to whether anything is said about the railroad retirement benefits." (151)

Plaintiff's counsel argued that plaintiff was being forced to go into the matter of the retirement benefits. The court replied: "If Mr. Prince asks you anything directly about railroad retirement benefits, I will agree with you; otherwise Mr. Starnes is not forced to go into it." (151-152)

In the presence of the jury, plaintiff testified that from November, 1971 until he returned to work he made six deposits and from the time he was discharged from his job until a month prior to the trial he averaged four or five deposits a month. (152-153) When asked the source of the deposits, he stated that the funds came from six sources: Loans; railroad sickness benefits; his daughter; his sixteen year old son; cash kept at home in a locked box in his bedroom; unemployment compensation. (153-154) He did not identify the odd jobs as a source of any of the deposits.

At the conclusion of the plaintiff's testimony, the trial court admonished the jury not to consider the railroad retirement benefits, even though the evidence was brought out by the plaintiff, himself. (159)

ARGUMENTS

1. May a plaintiff in a Federal Employers Liability Act case, who is previously cautioned not to do so, voluntarily inject evidence of the receipt of Railroad Retirement Board benefits and thereafter assert prejudicial error as a result of his disregard of the admonition?

The plaintiff testified that prior to returning to work on January 13, 1972 his earnings were only $328.67 and subsequent to his discharge by the railway company on February 8, 1972 he only had had odd jobs and was unable to get employment with other railroad companies. This testimony was inconsistent with his pre-trial testimony that he was unable to take a job and was confined to doing housework, reading and riding around. (It should also be noted that plaintiff continued to claim for lost wages subsequent to January 13, 1972 until the proceedings out of the presence of the jury were held concerning the scope of the cross-examination of the plaintiff about the source of his bank deposits. At that point, he disavowed any claim for lost wages subsequent to that date. But even then, his attorney asserted, "We still say he has injury, but we don't say it is permanent." (144))

The petitioner's testimony was sprinkled with gratuitous remarks and statements repeatedly contradicted. His credibility became an important issue and the cross-examination concerning the source of his bank deposits became all the more important to this issue when he explained out of the hearing of the jury that he kept large sums of money (the

source of which was never explained) in a locked box in his bedroom. He sought to impress the jury with the seriousness of his injury by suggesting that he was limited to doing odd jobs. It was not until his bank statements had been subpoenaed that he even admitted an ability to do any work. One month prior to trial, in a deposition, his contention was that he was unable to do anything.

After asserting that he was fired because he had sued the railway company, petitioner denied that he ever had knowledge of an investigation which had been pending ever since the accident relative to his entire work record. Yet, on cross-examination he acknowledged receipt of the notice of such an investigation. He also testified that he was never given the opportunity to review the transcript of the hearing conducted by the railway company which resulted in his discharge. Evidence was introduced that he had reviewed the transcript and requested certain changes to be made in it. Also, he denied certain statements he made at the hearing conducted by the Railway Company and was contradicted by the shorthand reporter who took the testimony verbatim. In short, the petitioner's credibility was much in issue.

At the trial, plaintiff's attorney argued that if the plaintiff was questioned about the deposits it would disclose that he had received benefits from the Railroad Retirement Board. It was made perfectly clear by the trial court that testimony concerning Railroad Retirement Board benefits was not admissible and the plaintiff was cautioned that he should not mention those amounts. Counsel

for the railway company likewise advised the plaintiff that his questions were not aimed at disclosure of Railroad Retirement Board benefits and that he should not so respond in answering the questions. The bank deposit statements, themselves, were not being introduced into evidence and benefit deposits did not have to be explained. However, plaintiff's counsel argued that the plaintiff was being forced to disclose those benefits.

When the jury returned and the cross-examination proceeded, the plaintiff immediately began the explanation of the source of the money deposited into his account by mentioning "railroad sickness benefits." He also stated that other sources were loans from the bank, amounts received from his daughter, amounts received from his son, the money he kept at home and unemployment compensation benefits.

If the petitioner was prejudiced by his voluntary mention of railroad retirement benefits, the time to act would have been at the time the evidence came out by a motion for a mistrial. By waiting until the return of the jury with its verdict for the defendant, the plaintiff waived any right to claim error.

The petitioner also argues that by allowing examination concerning his bank statement he was "required" to mention the unmentionable. Indeed, if petitioner felt constrained to mention the benefits, the force was exerted by his own counsel who said in the presence of the plaintiff at the conclusion of the lengthy discussion concerning the evidence, "For the record, we would put on there that we are forced

to go into any matters that we feel are inadmissible as far as railroad retirement because of the ruling." (151)

The cases cited by the petitioner hold that it is improper to impeach or impute motives to a railroad worker by eliciting testimony that he was the recipient of Railroad Retirement Board benefits. Respondent does not argue that evidence of Railroad Retirement Board benefits is admissible or that the cases cited by the petitioner do not hold as he contends. However, no cases are cited by the petitioner to the effect that a plaintiff who voluntarily injects inadmissible evidence, especially after being repeatedly cautioned that he need not do so, may thereafter complain because he volunteered such inadmissible evidence. Such a ruling would afford a plaintiff the right to force a mistrial in any case by simply volunteering the inadmissible evidence, or as in this case, by awaiting the outcome of the jury's verdict and then seeking a new trial. In most negligence cases, a mistrial is called for if a plaintiff injects evidence that the defendant is insured. However, if the defendant volunteers the information he cannot complain.

2. Did the trial court misinstruct or erroneously explain its prior charge to the jury when it responded to a question from the jury?

In the final pre-trial order, the petitioner's factual contentions were that the railway company violated the Boiler Inspection Act and/or the Federal

Employer's Liability Act. At the trial, the petitioner abandoned his claim under the Federal Employer's Liability Act, which would have required the proof of negligence and would have afforded the railway company the partial defense of contributory negligence. Instead, he chose to pursue the violation of the Boiler Inspection Act which did not require proof of negligence and to which contributory negligence is no defense.

The factual contentions set forth in the final pre-trial order by the petitioner concerning violation of the Boiler Inspection Act were that there was "an accumulation of sand, dirt and grit on the floor, steps and threshold" of the engine. There were no other factual contentions to support a violation of the Boiler Inspection Act.

In his opening statement, petitioner's counsel stated that he would prove that the petitioner slipped because "there was sand and dirt in this area [the cabin door threshold] and other foreign material." (15) He also stated that at the threshold there was a strip "anywhere from three-eighths of an inch to a half an inch" which should have been "flush with the floor." At the conclusion of the opening statement by petitioner's counsel, both counsel conferred with the court concerning the contention of a defect in the doorsill. Petitioner's counsel advised the court that he was "not asking the jury to say that this was not a proper appurtenance. All we are saying, he had to step up." (18) It was also agreed that the railway company counsel in his opening statement would advise the jury that there was no contention of a defective doorsill.

Apparently, the jury was not then dissuaded.

The plaintiff's evidence was that his foot slipped on the accumulated sand, causing him to fall. Therefore, the court charged the jury that: "Under the circumstances of this case, the existence or not of the amount of sand at the steps and threshold of the cabin is all you may consider in determining if the railway violated this duty [that is, to provide the plaintiff with a locomotive in proper condition and safe to operate in the service to which it was put, and that it may be employed in the active service of the railway without unnecessary peril to life or limb.] There is no claim and no evidence to support any claim that this locomotive was improperly constructed in any manner." (6) No objection was taken to this charge. Indeed, it was a simple and concise statement of the plaintiff's theory of his case. The court also fully charged the jury, as requested by the plaintiff, concerning the railway company's duty under the Boiler Inspection Act. (5-7)

The jury began its deliberations at 4:10 p.m. At 5:50 p.m., the jury returned with a question as follows: "Does the entrance/exit through fireman's door (engineering design) comply with the 'Boiler Act' in question?" After reading the question to counsel out of the presence of the jury, the court stated, "I think the answer is obvious. . . I told them that the only thing they had to consider was the question of the sand." (11) Counsel for the plaintiff remained silent. The jury was brought in and the court reminded them that "I have told you that you

are not concerned with the actual construction or design of the engine. The sole question you have relates to the question of sand, if any, and the extent of the sand, and so on, on the steps and threshold." The jury indicated that the court had answered its question. (12)

The court's response to the jury's question was not confusing and in no way changed the formal charge previously given to the jury, to which no objection had been made. In his formal charge, the trial court advised the jury that they were only to consider "the existence or not of the amount of sand at the steps and threshold of the cabin." When, in response to their question, the trial court reminded the jury only to consider "the question of sand, if any, and the extent of the sand, and so on, on the steps and threshold," he was not injecting a greater burden of proof upon the plaintiff. To say "the question of sand, if any, and the extent of the sand," is to say no more than "the existence or not of the amount of sand." The petitioner's argument now is nothing more than a quibble, and one without merit, at that.

It was apparent from the question that the jury was concerned about whether there was a contention that the structural design of the threshold violated the Federal Boiler Inspection Act. The idea was implanted in the mind of the jury in the opening statement of plaintiff's counsel. In his first remark in response to the question, the trial judge said, "I have told you that you are not concerned with the actual construction or design of the engine." (12) No objection was made to that response.

It is beyond the pale to believe that the trial judge's response to the jury's question about structural adequacy was misinterpreted. Petitioner suggests that the prejudicial impact of the court's response was shown by the return of the jury eight minutes after the question was answered. It is much more obvious that the quick return of the jury disclosed their confusion over whether there was an issue of defective design.

The cases cited by the petitioner in support of his argument deal generally with the sufficiency of the evidence to sustain a verdict based upon violation of the Boiler Inspection Act. No issue is taken as to the holdings of those cases; however, they fail to meet the issue raised in this appeal.

CONCLUSION

It is respectfully submitted that the trial court committed no error in the particulars raised. The plaintiff received a fair trial about which he can not properly complain. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three printed copies of the Brief in Opposition to Petition for Writ of Certiorari in the case of Robert L. Starnes v. Norfolk and Western Railway Company were deposited in the United States mail, first class, prepaid to Dennis F. McMurran and Raymond H. Strople at their office of Moody, McMurran & Miller, P. O. Box 1138, Portsmouth, Virginia 23705 on the 20th day of March, 1974. It is further stated that the brief in opposition has been served on all parties.

William T. Prince

William T. Prince